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AUTHOR	McCord, Robert S.; Mattocks, T. C.; Kops, Gerald
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ABSTRACT

This paper attempts to identify benchmark considerations when entertaining the question of private management of public school facilities. Management possibilities include contracting for services and charter conversion. The paper also highlights elements of contract law pertinent to formal agreements made between school districts and private providers. In the early stages of doing business with private providers, care must be taken to control the spin of public opinion. Building support for reform efforts is an incremental process requiring a constant flow of factual information, anecdotal evidence, and independent research findings. Emphasis must be placed on beginning contract negotiations early in the process to ensure that all provisions are artfully crafted and meet with broad acceptance, particularly important when negotiating how those provisions affect existing labor agreements. The paper includes a suggested list of contract contents, starting with recitals/preamble; definitions; establishment or determination of school sites; term of agreement and starting date; mission statement; goals, objectives, and pupil performance standards; and financial arrangements, among other provisions. This list provides a starting point for drafting the contract between school authorities and a school management vendor. (RT)

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Doing Business with Entrepreneurial America: Protecting School District Interests.

Robert S. McCord
T. C. Mattocks
Gerald Kops

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DOING BUSINESS WITH ENTREPRENEURIAL AMERICA: PROTECTING SCHOOL DISTRICT INTERESTS[1]

EDUCATION LAW ASSOCIATION ANNUAL CONFERENCE

NOVEMBER 15, 2002

Robert S. McCord
University of Nevada, Las Vegas
T. C. Mattocks
Bellingham (MA) School District
Gerald Kops
University of Nevada, Las Vegas

INTRODUCTION

The 1925 decision of the Supreme Court delivered by Justice McReynolds in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (268 U.S. 510, 45 S.Ct. 571) offers a prophetic view of the rightful place of business interest in the realm of public schooling. The rejection of the exclusive right of the state to operate schools and the affirmation of the liberty rights of the business owners to engage in the enterprise of schooling resounds today in a form probably not contemplated by Justice McReynolds and his learned colleagues on the court. Nevertheless, public schools today find themselves partners with entrepreneurs who view the operation of schools as a growing opportunity to realize a fair profit to their stockholders. The often overlook the admonition by the court in *Pierce* that while the exclusive franchise to operate schools does not solely reside with the government, by and large the governmental responsibility for "reasonable regulation" of all schools has not been diminished. The lessons of *Federalist 45* echo in Madison's charge to government to ensure for the greater good of the people through exercise of the authority needed to address their changing needs. In doing so, schooling remains an important obligation of government.

The conflict over the humble enterprise of the *Society of Sisters* has evolved into a fiercely competitive cadre of publicly traded profit making enterprises with national sales forces and multimedia marketing campaigns. Regardless of the glitz, the reality is that school boards find themselves engaged in developing, approving, and managing multi-million dollar multiple-year contracts with private providers while retaining significant responsibility for ensuring that the rights of students attending schools run by entrepreneurs are met. The skills required reside outside of the experience of many who have long

[1] The comments and suggestions of the presenters are not offered as a legal advice or substitute for legal counsel. Those considering engaging a private manager for public schools should consult legal counsel

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exercised exclusive control over the enterprise. This paper attempts to benchmark those factors important for school districts to consider in doing business with private profit making providers. In addition, it endeavors to highlight the elements of contract law pertinent to the formal agreements between school districts and its private providers. Finally, reflections are offered on the implementation of such agreements and the translation of contract language and political intent into operational terms.

BENCHMARKS

Whether cajoled, forced, or genuinely committed to the prospect of turning over control of a public school to a private provider as a contract for services or charter conversion, the realities associated with the process involved are formidable. We have studied the early stages of the process and have come away having learned some important lessons[2].

- *Care must be taken to control the spin of public opinion.*

Brief Discussion: Too often boards limit their policy-level discussion of privatizing to the private provider without first engaging the community in a well-planned and carefully executed public information campaign. There is ample evidence of the negative consequences to those who fail to first engage their community in the discussion of the potential benefits of privatizing. Public sentiment data repeatedly demonstrates that the public is skeptical of the reform actions of school boards and holds them to a strict standard of open and interactive governance as a condition of broad community acceptance.

- *Building support for reform efforts is an incremental process requiring a constant flow of factual information, anecdotal evidence, and independent research findings.*

Brief Discussion: Support for privatizing the operation of schools must be built on fact-laden information and reliable anecdotal evidence. Unfortunately, many of the private providers fail, as do many of the public school counterparts, to back their performance claims with empirical data and subsequently subject themselves to a lambasting[3]. In addition, they fail to capture on the benefit of anecdotal evidence as a persuasive influence.

- *The disruption to reform efforts produced by naysayers with political motives must be anticipated and merits a carefully orchestrated response.*

Brief Discussion: School boards represent the founder's hope that government close to those affected is the best form of government, yet politics are palpable in the boardroom. The adage that Speaker Tip

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early in the process.

[2] From "Edison Comes To Town," by Robert S. McCord, 2001, *American School Board Journal*, Volume 188, Number 12, December 2001, p. 24.

[3] "Trends in Student Achievement for Edison Schools, Inc: The Emerging Track Record," by F. Howard Nelson, American Federation of Teachers, October 2000.

O'Neill coined[4] that "all politics is local" is proven in discussions of privatization of schools. Political adversaries will use the occasion to divert attention from the substance of the issue.

- *Enlightened school reform efforts use the cyclical nature of the school year to amplify and showcase the reform effort under consideration.*

  Brief Discussion: Bad news in the school business is inevitable and predictable. The often-overlooked reality is that bad news is often cyclical - recurring at the same time each year (e.g., test scores, dropout reporting). Linking a discussion on privatizing in close proximity to the bad news of test scores, e.g., is a brew for disaster.

- *The content of the bundle of reform services available is affected less by a sense of altruism and more by a profit motive.*

  Brief Discussion: Let there be no confusion, school boards are motivated by political survival and student learning and private enterprise by a profit motive and reasonable return to investors. While these need not be conflicting motivations, in low or marginal student support districts, private providers must resort to philanthropic giving to sustain profits or in the least desirable scenario - the unbundling of components of the promised instructional design. This unbundling may show itself in turnover of higher priced teachers, elimination of essential elements of the instructional program, and "cherry picking" of students.

- *Engaging in a business arrangement between government and a private profit-making enterprise requires significant due diligence into the past performance of the business, the business practices employed by that enterprise, and their capacity to deliver the contract provision services in the future.*

  Brief Discussion: There is a growing body of evidence concerning the factors leading to the failure of charter schools and private providers. Too often this information surfaces too late to resolve the problems. Yet there is much that can be learned about your private profit-making partner prior signing a contract. Too few conduct a careful investigation of the nature of the business practices and experience of their potential partner. For example, publicly owned companies are required to disclose the condition of their enterprise in the SEC 10-Q statements. The information contained in such statements often proves enlightening when weighed against claims. Much of the information is readily available, but is often overlooked by districts, and forms an essential element of the due diligence required for 7-8 digit contracts. In this day of high profile corporate failures, one would not want their dealings with a private provider to be labeled "Enronic."

- *Emphasis must be placed on beginning contract negotiations early in the process to ensure that all provisions are artfully crafted and meet with broad acceptance. This is particularly important when negotiating how those provisions affect existing labor agreements.*

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[4] All Politics Is Local. By Tip O'Neill, Random House, 1994.

Brief Description: The American labor movement has made some of its most dramatic gains in the past three decades in the public education system of this country. There is growing skepticism among the labor movement of privatizing of schools while some evidence suggests that if labor is involved in the consideration of the operation of schools by a private entity early in the process, the potential for successful negotiations improves. The AFT has posted its concerns with Edison on the Web. Review of those materials may assist district representatives in preparation of contract provisions that guard against problems identified. ((enter http://www.aft.org/search.html) At the AFT search engine enter Edison and a number of articles are displayed.)) Further, public companies are required to make periodic filings with the Securities and Exchange Commission discussing the condition of the business and risks to its fiscal health going forward. The filings are also accessible on the web and may assist in the preparation for contract negotiation. ((http://www.sec.gov/) The second listing on the Commission Home page contains prompts to locate company documents))

- *Selection of schools is not only an exercise in gaining strong staff and community support, but represents a potentially disruptive influence on reforms already underway.*
  Brief Description: "Cherry picking" of schools is an understandable motivation for providers, yet school boards may have other needs.

- *Determination of the criteria for selecting the schools well in advance of the decision may prove to garner support for those affected including their labor representatives.*
  Brief Description: The annual *Kappan/Gallup* poll instructs us that the American public supports their neighborhood school but is less supportive of the schools in general. When one proposes an entirely new design and management of a neighborhood school, the reaction will be swift. Enlightened efforts in this regard relies on early inclusion of those influences by the privatization efforts - doing otherwise will prove detrimental.

- *Public sector, by design and as inefficient as it sometimes appears, must deliberate in the most public of forums – a practice alien to all but a few businesses.*
  Brief Discussion: Sunshine or Open Meeting Laws often prove to be a new experience for private enterprise. Deviating from open and public discussion of the privatizing of schools presents a threat to successful implementation on a variety of fronts.

CONTRACT CONTENTS

The following suggested list of contract contents assumes, of course, that any state constitutional and statutory authority issues have been resolved.[5] Further, the suggested list is not meant to exclude provisions that reflect unique issues presented in a particular environment.[6] For example, a contract to operate a district charter school would, depending on statutory requirements, require school district governing authorities, as well as charter school trustees and vendor signatures.

PROVISIONS

RECITALS / PREAMBLE

This portion of the contract is introductory. It provides an opportunity to present the statutory authority for the contract. It also may be used to offer the chronology of the actions taken by the School Board authorizing the management contract. If the Board is the agent for approving charter school applications actions regarding approval of the charter may be included in the Recitals/Preamble paragraphs

DEFINITIONS

Terms peculiar to the education setting should be identified and defined. For example, there may be a specific term used to determine the per pupil revenue system calculation in the state. Accountability system terms may also be considered for inclusion in this portion of the contract so there is no confusion regarding their use throughout the document. Statutory references of terms used should also be part of the definition

ESTABLISHMENT OF OR DETERMINATION OF SCHOOL SITES

This provision includes the designation of the school sites that are the subject of the management contract.

TERM OF AGREEMENT AND STARTING DATE

The term of the Management Contract may vary. School authorities may wish a yearly renewal term. Some state laws may prohibit long term arrangements.

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[5] For example see Nevada State Education Association v. Clark County School District Case No. A433589, Dept. No. II, District Court, Clark County, Nevada granting summary judgment to school trustees and Edison Schools finding the vendor contract valid and enforceable.

[6] The authors wish to express their appreciation to the Denver Public School, Long Beach Unified School District, Clark County School District, Minneapolis Public Schools and Kansas City Missouri School District for their cooperation in this project.

GRADE LEVELS & MAXIMUM ENROLLMENT

This provision allows the parties to express the organizational framework for the management contract at the particular school site or sites. There may be statutory restrictions regarding class size. Statutory references should accompany language.

MISSION STATEMENT

Some school districts require each school to develop a mission statement. The contract provision offers an opportunity for the Board and Manager to express their understanding of the mission of the managed sites.

> "eg. "the mission of the ------ school is to prepare a diverse cross section of ---- children for success as students, workers, and citizens by providing them with a world class education at prevailing public school costs.

GOALS, OBJECTIVES, AND PUPIL PERFORMANCE STANDARDS

This provision includes Goals of the sites managed and the relationship of those goals to the other district managed schools. There is a hidden danger here if the goals of the managed sites appear to establish a level of "superiority" that may contradict the school district's stated goal of equal access to educational opportunity. The Educational objectives for the managed sites may also be stated in specific terms. For example, managers suggest that their skill will be reflected in higher student achievement at the managed sites. The Educational Objectives may be stated in such terms. "XX school will reach higher levels of reading achievement than district schools serving comparable students etc." An Evaluation plan for the managed schools should be set out in detail. The plan should indicate the nature of involvement in the state and federal assessment process with appropriate statutory references. The plan may also identify the assessment tools to be used in making assessment decisions. (eg Woodcock Reading Mastery Test) The use of portfolio assessment may be incorporated in this provision. Pupil performance standards should be addressed. The standards may include state standards, district standards or those uniquely developed by the parties. A Timeline for achievement of pupil performance standards and plan for taking corrective action should be included in the contract. This provision offers an additional benchmark for assessing the quality of the program. Edison utilizes a Quarterly learning contract as one tool for assessing the progress of students. The district should carefully assess the learning contract mechanism to determine whether it meets district assessment requirements

EDUCATIONAL PROGRAM AND CURRICULUM

Statutory requirements impacting on the educational program and curriculum offered in the managed school should be referenced in this provision. This provision may also provide an opportunity to address the waiver of certain requirements allowed under state statutes. If such waivers are only granted to

Charter Schools in the state, there is a question whether schools managed by entrepreneurs qualify for such waivers.

The Educational program components should be addressed in the contract. How many days of instruction will be provided? The length of the instructional day should be addressed. School organizational issues may be included. (primary K-2, elementary 3-5 etc.) The staffing model used by the manager, grouping of students, technology program, second language learning opportunities, arts instruction and curriculum integration may be subject to contract provisions. Documents describing the individual program requirements may be attached to the contract as appendices and incorporated by reference. The student assessment system should also be explained in detail. For example, what role, if any, will parents be expected to play in the assessment system?

If particular curriculum and instructional materials are to be used they should be referenced and attached as an appendix. Content standards should be specified.

The School calendar should be described and incorporated in the document.

If there are specific programs for English language learners the contract should contain a provision outlining the program and materials to be used in the program referenced and attached to the document.

Will the manager assume responsibility for serving disabled students in the managed school or will the school district retain that responsibility? If the district maintains that responsibility the impact on revenue the manager is entitled to receive must be addressed.

How is the manager to handle discipline and attendance? Are school district policies applicable or is the manager free to craft its own discipline and attendance policy? Does the school district wish to require the manager to adopt special discipline and attendance policies consistent with the mission of the managed school, for example, to serve 'at risk' students? It goes without saying, although we will, that federal guidelines regarding IDEA students must be upheld.

PUPIL SELECTION AND TRANSFER

The pupil selection provision may vary depending upon the type of school that is subject to management. For example, there may be publicity and recruitment issues attendant to charter school management that are not present when a regular district school is the subject of the contract because of designated attendance areas being established.

If a charter school is the subject of the contract pupil selection may also be an issue. Are applications required? Which applications, if any, will have priority? How will non-resident applicants be treated?

How will transfer requests be considered? Will district authorities review transfer requests? Will district policy regarding transfers apply to managed schools?

FINANCIAL ARRANGEMENTS

This provision addresses the district's obligation to fund the managed school. This provision must be drafted with great care. State statutes are often complex regarding revenue provided to fund district schools. A benchmark for establishing the financial arrangements is a thorough understanding of the revenue that is needed to fund a similar district school. Once the arrangement has been finalized, an example of the calculation of revenue should be attached as an appendix to the Contract and incorporated by reference. District representatives should be mindful of the rhythm of legislative activity impacting on financial concerns and tailor the contract language to provide for adjustment based on those actions.

Per pupil revenue, State and federal categorical aid, Specific program revenue (Eg. English language proficiency act, Gifted and talented aid, Insurance issues) and others specific to the school district concerned should be identified and addressed in the contract.

A provision regarding assistance on grant applications and pledge of funds acquired through grant applications should be part of the agreement.

SERVICES PROVIDED BY THE DISTRICT

The manager will wish the district to discuss services to be provided at no cost to the manager. Those items may include the following:

- Trash removal
- School security services
- Payroll, purchasing and other business services as may be requested and mutually agreed upon
- Participation in the district's standardized testing program
- Personnel services including screening and background checks for applicants
- Food services
- Consultation related to compliance issues, including how to address the needs and support of disabled students
- Completion of required state and federal reports as may be requested and mutually agreed on
- Hearing officer for expulsion hearings and special education due process hearings
- Participation in the substitute pool

- Access to the district's on-line purchasing and pupil data systems, the staff needed to use the systems, and the software specifically needed to access these systems
- Public information systems as may be requested
- Intra-district mail services
- Access to the commodity warehouse
- Legal services related to the enforcement of the compulsory school attendance act
- Services to be provided at the district's cost and subject to availability should also be included in the contract. Examples of such items include:
- Emergency maintenance and repair of the facility
- Excursion transportation
- Use of printing services

DISBURSEMENTS BY DISTRICT

If the district is to provide a stipend for books, supplies and materials the amount and time of disbursement should specified. A benchmark would be the amount provided to each regular district school.

Schedule of financial payments

This is a key provision. Obviously, the provision should reflect the schedule that the district receives funding from state and local sources. But other considerations may trigger the district's obligation to provide revenue to the manager. Assessment reports may be a precondition to revenue obligation. The creativity of the negotiators in the unique circumstances presented by the negotiation must be considered in determining the schedule. The district may not wish to forward fund the contract. Why provide the manager the use of the money prior to delivery of the service? In some states, there is a prohibition against paying for services before they are actually delivered. What if any deduct should be made as a guarantee of promised performance?

Adjustments

The contract should include a provision for adjustments to final payment. Adjustments are addressed in state law and may provide a benchmark to issues to be addressed. Examples of such issues are as follows; (adjusted by)

- Official membership counts
- Changes in per pupil amounts received by the district
- Changes consistent with state department audit findings
- Later funding adjustment if FTE is % lower on March 1st than FTEs enrolled on statutory count day

Expenditures

A Budget of proposed expenditures by the manager should be required as a precondition for starting disbursements. A report schedule on budget expenditures should be established so that the school

district has a timely reference for reviewing the fiscal status of the managed school in relation to the manager's contractual responsibilities.

Furniture and equipment

What if any district equipment will be provided to the manager for use at the managed school. Responsibility for loss or damage should be considered. Equipment to be provided by the Manager should also be addressed. For example, Edison has promised to provide laptops as part of the contract and install an intranet system between and home and school to facilitate their program. Issues regarding this equipment should be included in the contract. Ownership of equipment, responsibility for loss or damage by students and modification of managed school structure are three issues that should be addressed.

Financial audit

State statutes should provide some guidance. But remember that the district may want additional reports from the manager in order to protect district interests.

DISBURSEMENTS BY MANAGER

On occasion a manager has promised to invest its own funds in the school/s to be managed. A provision should address these issues with appropriate schedule for disbursement. Perhaps the promised investment should be a precondition for execution of the contract.

GOVERNANCE

Specific provisions regarding governance would be dependant on type of school management system that is the subject of the contract. In a Charter school operation a separate governing board may guide school governance instead of directly reporting to the school district board of trustees. State statutes will address the charter school trustee governance authority. Reference should be made to appropriate state statutes regarding the interrelationship between the charter school governance authority, manager and school district trustees.

If the contract involves a District school operation again reference appropriate state statutes regarding authority, accountability and reporting requirements.

PERSONNEL

This is an extremely important provision. The first important issue is the type of management arrangement. If a charter school is involved state law may require deferral to school district collective bargaining agreements regarding wages hours and working conditions. Each state differs in its approach to this issue. Nevada law, for example, requires charter school employment practices conform to school district bargaining agreements. Other states offer more flexibility in employment arrangements. Some

states require employment of licensed personnel others provide for waiver or more flexibility. The provision should also address the status of district personnel who decide to teach in the managed school upon the termination of the management agreement or desire to transfer back to a regular district school. If the conditions of employment will be different than regular district schools negotiations may be required to address the differences.

The manager may wish to train personnel. Provisions regarding the managers responsibilities in the area should be carefully spelled out.

LIABILITY ISSUES

The contract should address liability issues. Again the type of management structure will dictate some of the language and responsibility questions. If it is a district school under management the language should address the application state statutes waiving sovereign immunity as they apply to district personnel.

PENSION BENEFITS

The handling of pension payments by school district or manger will also a subject of discussion. Consultation with state authorities may be required to avoid problems with credits and application of state law to charter schools for example.

JOB DESCRIPTIONS OF CHARTER SCHOOL EMPLOYEES OR DISTRICT EMPLOYEES SERVING IN MANAGED SCHOOLS

The unique personnel structure should be addressed and job descriptions appended to the contract so that those holding positions with the managed school are alerted to the unique aspects of the managers employment setting.

FACILITY

The site/s were identified earlier in the contract document but a specific portion of the document can be devoted to site issues. Authority and responsibility for renovation, upgrading and operation of facility should be included in the contract document. Ownership of improvements should be addressed. Access to inspect the facility to determine compliance with the agreement should be outlined. Responsibilities of the parties should the site become unusable should be specified.

SCHOOL OPERATIONS

The operational authority of the manager should be specified. This will depend on the type of management system adopted.

The nature and scope of operational authority may be specified by the charter school law. Reference to state statues may be included in this provision. Subjects such as general powers, the power to contract

for goods and services, prepare a budget, select and hire personnel, purchase, lease or rent equipment and the power to accept and expend gifts or donations may be addressed in this provision.

The managers commitment to non-discrimination, open meetings law, public records law, pupil records law (FERPA other state statute) and duty to comply with policies, regulations and laws of Federal, state and district regarding school operations may be outlined in this provision.
Waiver provision reference state law
The contract should also address the ability of the manager to bind district in contractual matters

Data collection and preparation of reports should be addressed. The district may wish to have data regarding staffing, pupil enrollment, records and school operations as may be required by any government agency, court order.

TRANSPORTATION

Responsibility for transportation to and from school should be addressed in the contract. If the school district provides the service should that impact on the financial arrangements provision? If the vendor provides that should be reflected in the financial arrangements. Should the manager be free to negotiate with public or private vendor for the service?

INSURANCE

The nature and scope of the manager responsibility to provide insurance coverage must be outlined. Consideration should be given to covering costs entailed if the manager fails to perform the contract. Performance bond availability should be explored. Coordination of risk management should also be addressed in the insurance provision.

TERMINATION AND DISSOLUTION

The contract should a termination or dissolution provision. The provision should specify the circumstances and procedures for termination by the district. The clause should include material breaches of the contract but in this case might specify failure to achieve educational objectives identified earlier in the contract. Fiscal mismanagement may also be a basis for termination.

Termination by the vendor may include material breach (Non-appropriation of funds by the district) under to the terms of the contract.

There may be special terms required with regard to the notice of the ongoing relationship of the parties. For example, if minimum enrollment numbers are not met by a certain date there may be a basis for

terminating the contract. Here the specific nature of the engagement and educational setting will dictate the provisions details.

General provisions

All contracts gather certain standard clauses under the general provisions heading. Provisions specifying that the written contract supercedes all prior oral discussions, a mechanism for amending the contract, law applicable to interpretation and application of the agreement and provision of Administrative audit to determine the compliance with the agreement should be considered for inclusion under the general provisions heading.

Another clause for inclusion in the general provisions section would be Notices. Specifically, how all notices required under the contract will be provided. Normally they are provided in writing and effective upon personal delivery or three days after mailing when sent by certified mail. The clause may also identify the persons and addresses authorized to accept notices.

Waivers

Here specific reference should be made to state law. For example, charter school laws may provide a procedure for seeking waiver of certain state laws regarding school operation. The waiver process may be described and the process for seeking a waiver outlined.

Dispute resolution

This is a particularly important provision. Issues will arise regarding the interpretation and application of the agreement. A procedure for resolving these issues should be outlined in the agreement. An informal process followed by a formal process should the matter remain unresolved seems appropriate. Consent to mediation should the parties be unable to resolve the issue should be considered. It may even be appropriate to consider an arbitration provision if the dispute is not resolved in mediation. A process similar to a grievance procedure may provide a starting point for considering an arbitration provision. Arbitration and mediation are preferable to costly time consuming resort to judicial authority.

Conclusion

This paper has attempted to identify benchmark considerations when entertaining the question of private management of public school facilities. In addition, the paper has provided a suggested list of contract provisions as a starting point for drafting the contract between public school authorities and a school management vendor. Once the contract has been executed, implementation and application issues will arise. These matters will be explored during the live session at the annual conference.

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